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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

STEVEN LUBETSKY,

Petitioner,

v.

APPLIED CARD SYSTEMS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. WARE CORNELL, JR.
Counsel of Record
ARIANNE BOMBALIER SUAREZ
CORNELL & ASSOCIATES, P.A.
Attorneys for Petitioner
1401 E. Broward Blvd.
Suite 204
Fort Lauderdale, FL 33301
(954) 524-2703

176678

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

48 pp

QUESTIONS PRESENTED

I. Whether an employee must prove as part of a prima facie case of employment discrimination and in order to survive a motion for summary judgment that the decision-maker of the adverse employment decision had actual knowledge of the employee's protected characteristic.

II. Even if an employee is required to prove actual knowledge by the decision-maker as part of a prima facie case of discrimination, whether circumstantial evidence of such knowledge is sufficient to defeat a motion for summary judgment.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vi

Opinions Below 1

Statement of Jurisdiction 1

Statute Involved 1

Statement of the Case 2

Proceedings Below 2

Statement of Facts 3

Reasons for Granting the Petition 5

I. An Employment Discrimination Plaintiff Is Not Required To Demonstrate As Part Of A *Prima Facie* Case Of Discrimination And In Order To Survive A Motion For Summary Judgment That The Decision-Maker Of The Adverse Employment Action Had Actual Knowledge Of The Employee's Protected Characteristic. 7

Contents

Page

A. Standard of Proof Utilized in Religious Accommodation Cases 8

B. Circuits interpreting employer knowledge in relation to a *prima facie* case .. 10

II. Even If An Employee Is Required To Prove Actual Knowledge By The Decision-Maker As Part Of A *Prima Facie* Case Of Discrimination, Circumstantial Evidence Of Such Knowledge Should Be Sufficient To Defeat A Motion For Summary Judgment. 13

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) 6, 9

Bass v. Board of County Commissioners, 256 F.3d 1095 (11th Cir. 2001) 13

Clay v. Holy Cross Hospital, 253 F.3d 1000 (7th Cir. 2001) 10

Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S. Ct. 2943 (1978) 5, 12

Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.3d 578 (3d Cir. 1996) 11

Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993) 13

Gordon v. New York City Board of Education, 232 F.3d 111 (2d Cir. 2000) 5, 11

McDonnell Douglas v. Green, 411 U. S. 792 (1973) 5, 7, 8, 12

Prebilich-Holland v. Gaylord Entertainment Company, 297 F.3d 438 (6th Cir. 2002) 11

Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097 (2000) 8, 10, 16, 17

Cited Authorities

	Page
Robinson v. Adams, 847 F.2d 1315 (9th Cir. 1987) ..	10
Shelton v. University of Medicine & Dentistry of New Jersey, 223 F.3d 220 (3d Cir. 2000)	9
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)	5, 12
Virts v. Consol. Freightways Corp. of Del., 285 F.3d 508 (6th Cir. 2002)	8
Statutes:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 2000e, *et seq.*	3
Title VII of the Civil Rights Act of 1964 .....1, 6, 7, 8, 9	

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed July 12, 2002 ..... 1a

Appendix B — Order Granting Defendant's Motion For Summary Judgment Of The United States District Court For The Southern District Of Florida, Northern Division Dated October 14, 2001 And Filed October 15, 2001 ..... 10a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed September 3, 2002 ..... 22a

Petitioner, Steven Lubetsky, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The judgment of the Court of Appeals is published and reported at 296 F.3d 1301 (11th Cir. 2002) and reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion of the district court in this case is reproduced at 10a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 12, 2002 and denied Lubetsky's Petition for Rehearing on September 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 is set forth below:

> Sec. 2000e-2. – Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF THE CASE

Proceedings Below:

On March 10, 2000, Steven Lubetsky ("Lubetsky") filed this action against Applied Card Systems, Inc. ("ACS"), alleging a claim of employment discrimination against.

ACS filed its Answer and Affirmative Defenses on April 19, 2000, and after discovery was concluded, it filed a Motion for Summary Judgment. Lubetsky responded to this Motion on June 25, 2001, and ACS submitted its Reply Memorandum on July 2, 2001.

On October 15, 2001, the District Court granted ACS's Motion for Summary Judgment and closed the case. On October 30, 2001, Lubetsky filed a Motion for Reconsideration of the Order Granting Defendant's Motion for Summary Judgment, and ACS filed its Response to this Motion on November 13, 2001. Lubetsky filed his Reply Memorandum in Support of Lubetsky's Motion for Reconsideration on November 27, 2001, and on November 28, 2001, the Court denied the Motion for Reconsideration.

On December 17, 2001, Lubetsky filed his Notice of Appeal of the Order Granting Defendant's Motion for Summary Judgment and of the Order Denying Plaintiff's Motion for Reconsideration. On May 23, 2002, the parties presented oral argument before the United States Court of

Appeals for the Eleventh Circuit, and on July 12, 2002, the Eleventh Circuit Court of Appeals affirmed the District Court's Orders in a published opinion reported at 296 F.3d 1301 (11th Cir. 2002).

Statement of Facts:

Steven Lubetsky ("Lubetsky") is of the Jewish faith, and he is an observant Jew. He filed this action against Applied Card Systems ("ACS"), alleging religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), after ACS rescinded its offer of employment to Lubetsky.

On June 5, 1998, Lubetsky interviewed with Ms. Gracia, a Human Resources employee of ACS, for the position of Correspondent Analyst, a position that involves analyzing credit card applications and issuing notices of approval or disapproval. Lubetsky completed an exercise as part of the interview, and Ms. Gracia told him that his performance was excellent and that based on his performance, his starting salary would be $22,000 rather than $19,000. She put the offer in writing. After receiving this offer at the interview, Lubetsky inquired about the accommodations the employer makes for the religious needs of its employees. He explained that he is of the Jewish faith and that there are several days during the year that he observes and would need to have time off on those days. Ms. Gracia explained that the company would allow him to take time off for holidays just as long as he did not go to extremes such as taking off on Purim.

Three hours after the interview, Ms. Gracia called Lubetsky at home and told him that at the time of the interview, she was not aware that they had promised the

position to someone else. Two weeks later, an ad appeared in the Sun Sentinel Newspaper advertising the same position that Lubetsky was told was closed. Lubetsky filed an EEOC charge of discrimination on February 10, 1999.

During the EEOC investigative process, ACS stated to the EEOC that Lubetsky's job offer was rescinded because the Department Manager, John Bardakjy, had told Ms. Gracia that he recognized Lubetsky's name as that belonging to a person who had behaved very aggressively at a job fair on a Saturday in August 1997. The reason given to Lubetsky about the position being filled was false. At Ms. Gracia's deposition, she admitted that she lied to Lubetsky about the position being closed. Mr. Bardakjy, at his deposition, testified that he met Lubetsky at a job fair in August 1997 and that Lubetsky displayed "overly aggressive tendencies". Bardakjy made no notes, had no verification that Lubetsky was the same person (for indeed he was not[1]) and testified that the entire confrontation with this other person lasted no more than a couple of minutes.

There is no record that Lubetsky ever attended a job fair in August 1997 as Mr. Bardakjy testified, and in response to a Request for Production, ACS stated that there was no employment application submitted by Lubetsky on that date.

In support of its Motion for Summary Judgment, ACS's alleged decision-maker, John Bardakjy, denied having knowledge of Lubetsky's religious faith, and on that basis, the Court granted ACS's Motion for Summary Judgment.

---

1. Lubetsky has submitted proof during discovery that he was in Pittsburgh the weekend Bardakjy said he met him at a job fair. He has also testified that as an observant Orthodox Jew, he could not attend any job fair on a Saturday, which is the day of the week Bardakjy claims to have met Lubetsky.

REASONS FOR GRANTING THE PETITION

This Court should grant the writ in order to determine whether an employment discrimination plaintiff is required to prove as part of a *prima facie* case of employment discrimination and in order to survive a motion for summary judgment that the decision-maker of the challenged employment decision had actual knowledge of the employee's protected characteristic.

Most of the Circuit Courts that have analyzed this issue have imposed such a requirement on an employment discrimination plaintiff, despite this Court's admonition that the *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence . . . on the critical question of discrimination" *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949 (1978) and that a plaintiff's initial burden of production is "not onerous", *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981).

The Second Circuit in *Gordon v. New York City Board of Education*, 232 F.3d 111, 113 (2d Cir. 2000), a retaliation case, rejected the approach that the Eleventh Circuit and other circuits have taken by refusing to require a plaintiff to establish actual knowledge by the decision-makers of the protected expression as part of the *prima facie* case. The Court held that to satisfy the knowledge requirement, nothing more is required than general corporate knowledge that the plaintiff engaged in protected activity. The Court found that a lack of knowledge on the part of particular individual agents is admissible as some evidence of a lack of causal connection,

countering plaintiff's circumstantial evidence of proximity or disparate treatment and that a jury can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities.

This Court in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986) declined to accept or reject any particular *prima facie* case or burden-shifting approach to Title VII religious accommodation cases because since the matter had been tried on the merits, the *prima facie* case issue was not before it.

Therefore, since this Court has not yet established a guideline for the analysis of this type of claim, much less require that actual knowledge by the decision-maker of the adverse employment action must be proven as part of a *prima facie* case in order to avoid summary judgment, this Court should grant this writ in order to define a plaintiff's burden in this regard and stop the lower courts from imposing this onerous burden on an employment discrimination plaintiff at the summary judgment stage when such a showing turns on the issue of credibility.

I. AN EMPLOYMENT DISCRIMINATION PLAINTIFF IS NOT REQUIRED TO DEMONSTRATE AS PART OF A *PRIMA FACIE* CASE OF DISCRIMINATION AND IN ORDER TO SURVIVE A MOTION FOR SUMMARY JUDGMENT THAT THE DECISION-MAKER OF THE ADVERSE EMPLOYMENT ACTION HAD ACTUAL KNOWLEDGE OF THE EMPLOYEE'S PROTECTED CHARACTERISTIC.

In affirming the District Court's Order granting Defendant's Motion for Summary Judgment, the Eleventh Circuit held that "it is necessary for a plaintiff attempting to establish a *prima facie* case of intentional discrimination under Title VII to demonstrate the challenged employment decision was made by someone who had knowledge of the plaintiff's religion". The Eleventh Circuit found that a plaintiff who cannot present such evidence cannot establish a *prima facie* case, and thus cannot survive a motion for summary judgment.

The effect of the Eleventh Circuit's opinion is that any employer can avoid liability in an employment discrimination case by simply filing an affidavit denying knowledge of the employee's protected characteristic, and since only an employer knows what is on its mind and it is impossible for an employee to attack that assertion, an employer can successfully get away with lying. This problem is the reason why this Court fashioned the formula outlined in its *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) decision, which allows an employee to establish a discrimination case through circumstantial evidence.

This holding and the similar holdings of other circuit courts that the Eleventh Circuit relied upon present an undue burden on an employment discrimination plaintiff, as they undermine well-established precedent that holds that an employment discrimination claim may be established through circumstantial evidence. (*See i.e. McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000)).

A. Standard of Proof Utilized in Religious Accommodation Cases

The Eleventh Circuit cited the standard of proof utilized in Title VII discrimination cases for an employer's failure to provide a religious accommodation. The standard requires that in order to establish a *prima facie* case, the plaintiff must show that: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she has informed the employer about this belief; and (3) he or she was disciplined for failure to comply with the conflicting employment requirement. *See Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 516 (6th Cir. 2002).

Although one of the elements of the *prima facie* case in religious accommodation cases outlined in *Virts* requires the employee to show that he informed his employer about his religious belief, the element does not outline a greater burden than that initial showing, such as requiring proof that the employer's agent who made the decision had actual knowledge of the employee's protected characteristic. Lubetsky, in fact, has demonstrated that he did inform the employer about his religious belief—he informed Ms. Gracia, who then had a conversation with Mr. Bardakjy about Lubetsky's job offer.

Interpreting the knowledge element to require a plaintiff to establish not only that he informed the employer, but that he informed the "right" person in order to establish a *prima facie* case and avoid summary judgment, eviscerates Title VII. Such a requirement undermines the law governing employment discrimination claims that permits an employee to establish his case through circumstantial evidence and leads to perverse results where employers will be encouraged to "pass the buck" of "final decision-making" by claiming the "right" decision-maker was never informed.

As the Third Circuit in *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000) observed, this Court has declined to accept or reject any particular *prima facie* case or burden-shifting approach to Title VII religious accommodation cases, citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67-68 (1986), where this Court specifically declined to "establish for religious accommodation claims a proof scheme analogous to that developed in other Title VII contexts, delineating the plaintiff's *prima facie* case and shifting production burdens" because since the matter had been tried on the merits, the *prima facie* case issue was not before it.

Therefore, since this Court has not yet established a guideline for the analysis of this type of claim, much less require that actual knowledge by the decision-maker of the adverse employment action must be proven as part of a *prima facie* case in order to avoid summary judgment, this Court should grant this writ in order to define a plaintiff's burden in this regard and stop the lower Courts from imposing this onerous burden on an employment discrimination plaintiff at the summary judgment stage when such a showing turns on the issue of credibility.

B. Circuits interpreting employer knowledge in relation to a *prima facie* case

In affirming the district court's order granting Defendant's Motion for Summary Judgment, the Eleventh Circuit cited to other circuits that have addressed the knowledge issue in relation to a plaintiff's *prima facie* case of discrimination. One such case is the Ninth Circuit case of *Robinson v. Adams*, 847 F.2d 1315 (9th Cir. 1987) which held that "no inference of discrimination arises from an adverse employment action unless the person who instigated that action [the "decision-maker"] knew that the plaintiff belonged to a class ... protected by Title VII".

In *Robinson*, however, the Court also recognized that the credibility of the employer on this issue could be a triable issue when evidence is presented that places the employer's credibility in doubt. Further and most important, this Court in *Reeves* has already spoken against a court making credibility determinations and weighing the evidence, and by affirming the District Court's grant of ACS's Motion for Summary Judgment, the Eleventh Circuit approved of the district court's credibility determination.

Other circuits presented with the issue of whether the employer had knowledge of the employee's protected characteristic have required an employment discrimination plaintiff to show as part of a *prima facie* case and in order to avoid a summary judgment ruling that the actual decision-maker who made the adverse employment decision had knowledge of the employee's protected trait. *See Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1005-07 (7th Cir. 2001) (holding plaintiff failed to establish a *prima facie* case of pregnancy discrimination even though she was visibly

pregnant where she could not prove the person who decided to terminate her employment knew she was pregnant); *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 580-582 (3d Cir. 1996) (holding plaintiff failed to establish a *prima facie* case of pregnancy discrimination even though she told six co-workers she was pregnant where she could not provide any evidence the person who decided to terminate her employment knew she was pregnant); *Prebilich-Holland v. Gaylord Entertainment Company*, 297 F.3d 438 (6th Cir. 2002) (holding that "in order to establish the fourth prong of a *prima facie* case of pregnancy discrimination, that is, that there is a nexus between the employee's pregnancy and the adverse employment action, the employee bears the burden of demonstrating that the employer had actual knowledge of her pregnancy at the time that the adverse employment action was taken."

However, the Second Circuit in *Gordon v. New York City Board of Education*, 232 F.3d 111, 113 (2d Cir. 2000), a retaliation case, refused to require a plaintiff to establish actual knowledge by the decision-makers of the protected expression as part of the *prima facie* case. The court held that to satisfy the knowledge requirement, nothing more is required than general corporate knowledge that the plaintiff engaged in protected activity. The court found that a lack of knowledge on the part of particular individual agents is admissible as some evidence of a lack of causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment and that a jury can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities.

The approach taken by the Second Circuit should be approved as the proper method of analysis of employment discrimination claims where the employer offers lack of knowledge by the decision-maker as a defense. This approach is in keeping with this Court's precedent that the *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence . . . on the critical question of discrimination". *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949 (1978). A *prima facie* case of disparate treatment under Title VII is established by proof of facts supporting an inference of intentional discrimination. *Furnco* at 438 U.S. 567, 576, 98 S. Ct. at 2949. This initial burden of production is "not onerous", *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981), and is met upon a "showing of actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon" race or another impermissible criterion. *Furnco* at 576, 98 S. Ct. at 2949.

The lack of knowledge defense goes to the heart of the issue of whether an employer discriminated against an employee, and an employer should not be permitted to parsimoniously label its employees by conveniently stating that those agents with knowledge of the employee's protected characteristic were not the decision-makers regarding the complained-of employment action. The issue of knowledge should not be treated as a threshold element that a plaintiff must prove in order to get his or her case to the jury. Instead, the issue of knowledge is itself an issue that a jury is required to resolve.

II. EVEN IF AN EMPLOYEE IS REQUIRED TO PROVE ACTUAL KNOWLEDGE BY THE DECISION-MAKER AS PART OF A *PRIMA FACIE* CASE OF DISCRIMINATION, CIRCUMSTANTIAL EVIDENCE OF SUCH KNOWLEDGE SHOULD BE SUFFICIENT TO DEFEAT A MOTION FOR SUMMARY JUDGMENT.

The Eleventh Circuit's affirmation of the district court's order is inconsistent with its own prior cases, cases that it cited in its Opinion affirming the District Court's Order, that have held that an employment discrimination plaintiff may establish knowledge through circumstantial evidence. (i.e., *Bass v. Board of County Commissioners*, 256 F.3d 1095 (11th Cir. 2001); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993)).

In one of the cases relied upon by the Eleventh Court in affirming the District Court's grant of Defendant's Motion for Summary Judgment, *Bass v. Board of County Commissioners*, 256 F.3d 1095 (11th Cir. 2001), a retaliation case that held that in order for a plaintiff to establish a *prima facie* case of retaliation, the plaintiff must show that the decision-maker who took the adverse employment action was aware of the protected expression, the Court also held that "this awareness, however, may be established by circumstantial evidence", *citing Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993), stating that close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated.

In *Goldsmith*, the employer argued that the employee failed to establish a *prima facie* case of retaliation because

she did not prove that the decision-maker even knew of the employee's conversation with a non-decision-maker to whom she made the protected expression. When presented with the disputed issue of whether the decision-maker was aware of the plaintiff's protected expression, the Eleventh Circuit concluded that the plaintiff Goldsmith offered sufficient circumstantial evidence that the decision-maker Mayor Shell was aware of her conversation with Councilman Harris to satisfy the causal link requirement of her *prima facie* case. The Eleventh Circuit held as follows:

> At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took adverse employment action. *See, e.g., Weaver*, 922 F.2d at 1525; *Simmons*, 757 F.2d at 1189. The defendant's awareness of the protected statement, however, may be established by circumstantial evidence. *Cf. Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992) (quoting *Visser v. Packer Engineering Assoc., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991) (en banc)) (noting that "all knowledge is inferential"), *cert. denied*, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46 (1992).

Lubetsky presented ample circumstantial evidence of knowledge by the decision-maker by showing the following:

(1) Lubetsky disclosed his religious faith to one of Defendant's decision-makers, Ms. Gracia, after she extended the job offer to him;

(2) Ms. Gracia, after Lubetsky inquired of the employer's policy regarding religious

holidays, stated to Lubetsky that the employer would accommodate as long as he did not "go to extremes" such as taking off on Purim;

(3) Ms. Gracia, after the interview, communicated to Mr. Bardjaky, another decision-maker, Lubetsky's job offer;

(4) approximately three hours after the interview wherein Lubetsky disclosed his religion and after the Bardakjy conversation, the job offer was rescinded;

(5) the reason given to Lubetsky for the rescission was that the position was already promised to someone else, and this reason was false;

(6) approximately two weeks after the rescission, an advertisement for the same position appeared in the newspaper; and

(7) the reason provided to the EEOC and in this lawsuit for the rescission was that the actual decision-maker, Mr. Bardakjy, recalled meeting Lubetsky at a job fair that Lubetsky never attended and that this decision-maker did not care for Lubetsky's personality.

The significance of the dishonest statement that Ms. Gracia made to Lubetsky about the position being filled was that it was dishonesty about a material fact.

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2108 (2000), this Court stated as follows:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992); *see also Wilson v. United States*, 162 U.S. 613, 620-621 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. ed. 1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

As Justice Ginsburg further emphasized in her concurring opinion:

> As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Ante, at 12. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated

> by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

With regard to Defendant's contention that Mr. Bardakjy met Lubetsky at a job fair, the fact that one of Defendant's decision-makers had already lied about the reason why the job was rescinded makes the fact that Lubetsky did not even attend the job fair more significant. It further adds to the inference that the employer's contention that it did not know of Lubetsky's religion was not truthful and was proffered to cover up a discriminatory act. Whether it was a case of mistaken identity on Mr. Bardakjy's part or a falsehood is a credibility issue that requires a jury's involvement.

Because in considering a motion for summary judgment,

> the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . that is, the court should give credence to the evidence favoring the non movant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses"

Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2110 (2000) (internal citations omitted), all inferences regarding the knowledge issue should be made in the plaintiff's favor.

In this case, the dishonesty of the employer's explanation for the rescission of the job, the conclusory explanation that the decision-maker met Lubetsky at a job fair that Lubetsky did not attend, and one of the decision-maker's disdain of Lubetsky's religious accommodation inquiry that an accommodation would be fine as long as he did not go to extremes such as taking time off for Purim, all permit a reasonable finder of fact to conclude that Lubetsky's religion and his accommodation inquiry regarding his observance of Jewish holidays caused Applied Card Systems to rescind its employment offer to Lubetsky.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. WARE CORNELL, JR.
Counsel of Record
ARIANNE BOMBALIER SUAREZ
CORNELL & ASSOCIATES, P.A.
Attorneys for Petitioner
1401 E. Broward Blvd.
Suite 204
Fort Lauderdale, FL 33301
(954) 524-2703

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 12, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-17203

D.C. Docket No. 00-8213-CV-PAS

STEVEN LUBETSKY,

Plaintiff-Appellant,

versus

APPLIED CARD SYSTEMS, INC., a corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(July 12, 2002)

Before EDMONDSON, Chief Judge, BLACK and COX, Circuit Judges.

BLACK, Circuit Judge:

This appeal involves a claim for religious discrimination for failure to hire in violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e to 2000e-17. Appellant Steven Lubetsky

alleges Appellee Applied Card Systems rescinded his conditional offer of employment because of his religion. Appellee, however, asserts the decision-maker was not aware of Appellant's religion when he decided to rescind the offer. The district court granted summary judgment in favor of Appellee because Appellant was unable to establish a *prima facie* case of disparate treatment discrimination. This appeal followed.

I. BACKGROUND

Although licensed to practice law in three states, Appellant sought employment with Appellee as a correspondence analyst. On June 5, 1998, Appellant interviewed with Debbie Gracia, a recruiter employed by Appellee. As part of the interview, Appellant was given several competency tests. According to Appellant, Gracia stated his performance was excellent and extended him a written offer of employment conditioned upon the satisfactory results of a credit check. After Gracia extended the offer, Appellant advised her he is Jewish and inquired about Appellee's leave policy for observation of religious holidays. Gracia, who also is Jewish, allegedly responded, "Of course we have to let you off on Jewish holidays, it's illegal if we don't, but just don't go to extremes like taking off on Purim." For her part, Gracia simply recalls Appellant stating the High Holidays were approaching and asking if he could have them off. She testified she did not understand he was an Orthodox Jew.

Immediately after the interview, Gracia sent an e-mail to John Bardakjy, the Manager of the Correspondence Department, notifying him that she had extended a conditional offer of employment to a person named Steven Lubetsky. Bardakjy

responded to Gracia that he recognized the name as being that of an individual whom he had met at a job fair in August 1997. Bardakjy recalled the individual behaved very aggressively and rudely upon learning Appellee was only hiring people with previous experience. Based upon his recollection of the individual with this name, Bardakjy directed Gracia to rescind Appellant's conditional offer of employment. Bardakjy explained to Gracia that Appellant's personality and demeanor would not be acceptable at Appellee's workplace. Bardakjy never mentioned Appellant's religion. Additionally, Gracia testified she did not tell Bardakjy about the conversation she and Appellant had concerning his religion.

After being instructed to rescind the job offer, Gracia telephoned Appellant at his home and falsely informed him that, unbeknownst to her at the time of their interview, the position already was promised to someone else. She, therefore, rescinded the offer of employment. Two weeks later, Appellant saw an advertisement in the Sun Sentinel newspaper soliciting applications for the same position for which he had applied and had been told was filled. As a result, Appellant filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging his job offer was rescinded because of his religion.

During the EEOC investigation, Bardakjy explained he had instructed Gracia to rescind the offer of employment because he recalled Appellant to be an aggressive and rude individual whom he previously had encountered at a job fair. Bardakjy also stated he was not aware Appellant was Jewish until he learned of Appellant's EEOC complaint. In addition, Gracia admitted that although she lied to Appellant when

she said the position had been filled, she did so to spare Appellant's feelings by not drawing attention to his perceived character flaws. The EEOC then issued a Dismissal and Notice of Rights letter, finding it could not conclude Appellant was discriminated against based on his religion.

Approximately one month after the conclusion of the EEOC's investigation, Appellant attended a job fair, where he advised representatives of Appellee that he had not attended the job fair at which Bardakjy thought they met. Appellant told the representatives he thought the decision not to hire him, therefore, was a case of mistaken identity. Thereafter, Appellant filed a complaint in the United States District Court for the Southern District of Florida alleging Appellee engaged in intentional religious discrimination by rescinding his conditional offer of employment. Specifically, he claimed Appellee refused to hire him because of his religion.

Appellee subsequently moved for summary judgement, arguing even after the completion of discovery, Appellant could not establish a *prima facie* case of religious discrimi-nation. The district court granted Appellee's motion, finding Appellant could not establish his *prima facie* case because there was no evidence Bardakjy knew Appellant was Jewish when he ordered Gracia to withdraw the conditional offer of employment. In response, Appellant filed a motion for reconsideration, which was denied. Appellant then filed a notice of appeal.[1]

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1. In addition to appealing the district court's grant of summary judgment to Appellee, Appellant appeals the district court's denial of Appellant's motion for reconsideration of the order granting Appellee's motion for summary judgment. We affirm without discussion the district court's denial of Appellant's motion for reconsideration. *See* 11th Cir. R. 36-1.

Appendix A

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo*, using the same legal standard employed by the district court. *Royal Ins. Co. of Am. v. Whitaker Contracting Corp.*, 242 F.3d 1035, 1040 (11th Cir. 2001). Under this standard, we view all facts and inferences reasonably drawn from the facts in the light most favorable to the nonmoving party. *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949 (11th Cir. 2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

III. DISCUSSION

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1994). Appellant alleges Appellee violated Title VII by failing to hire him on the basis of his religion. As a result, Appellant contends the district court erred in granting summary judgment in favor of Appellee.

A plaintiff alleging disparate treatment discrimination must first establish a *prima facie* case of intentional discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S.

792, 802, 93 S. Ct. 1817, 1824, (1973); *see also Bass v. Bd. of County Comm'rs, Orange County, FL*, 256 F.3d 1095, 1103-04 (11th Cir. 2001); *Walker v. NationsBank of Fla., N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995). Where the plaintiff proves his *prima facie* case by circumstantial evidence, the burden of proof shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824; *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981). Then, if the defendant carries his burden, the plaintiff must be given "a full and fair opportunity to demonstrate by competent evidence" that the presumptively valid reasons offered by the defendant were a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 805, 93 S. Ct. at 1826; *see also Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093.

As a general matter, under the four-pronged *McDonnell Douglas* framework, a *prima facie* case of intentional discrimination using circumstantial evidence is established if the plaintiff shows: (1) he is a member of a protected class; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected for employment; and (4) after the rejection, the employer continued to seek applicants with the plaintiff's qualifications outside of plaintiff's particular protected class. 411 U.S. at 802, 93 S. Ct. at 1824.

More specifically, where intentional religious discrimination under Title VII is alleged, a *prima facie* case is established if the plaintiff demonstrates the challenged employment decision was made by someone who was aware

of the plaintiff's religion. *See generally Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991) (noting the *prima facie* case for discriminatory discharge based on a plaintiff's religious practices is established by showing: (1) the practices are religious in nature; (2) the plaintiff called the religious practices to the employer's attention; and (3) the religious practices were the basis of the plaintiff's discharge); *cf. Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005-07 (7th Cir. 2001) (holding plaintiff failed to establish a *prima facie* case of pregnancy discrimination even though she was visibly pregnant where she could not prove the person who decided to terminate her employment knew she was pregnant); *Geraci*, 82 F.3d 580-82 (holding plaintiff failed to establish a *prima facie* case of pregnancy discrimination even though she told six co-workers she was pregnant where she could not provide any evidence the person who decided to terminate her employment knew she was pregnant); *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987) (concluding the *McDonnell Douglas* elements did not rationally create an inference of intentional discrimination even though plaintiff filled out an application for employment and checked a box indicating his race, where plaintiff offered no evidence the decision-makers knew or saw the information concerning his race). Accordingly, an employer cannot intentionally discriminate against an individual based on his religion unless the employer knows the individual's religion.[2] *See Robinson*,

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2. For example, in discrimination cases under Title VII for an employer's failure to provide a religious accommodation, several circuit courts have held the plaintiff must establish a *prima facie* case by showing: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she has informed

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847 F.2d at 1316 (indicating plaintiff could not establish a *prima facie* case where there was no evidence the decision-maker knew plaintiff belonged to a protected class). Therefore, when we evaluate a charge of disparate treatment employment discrimination, we must focus on the actual knowledge and actions of the decision-maker. *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1274 (11th Cir. 2002), *citing Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1105 (11th Cir. 2001).

In this case, Appellant failed to establish a *prima facie* case of intentional religious discrimination by Appellee because he did not present any evidence that the decision-maker knew of his religion. Instead, all of the evidence indicated Bardakjy, the individual who made the decision to rescind Appellant's conditional job offer, was unaware of Appellant's religion. First, Gracia testified she never told Bardakjy about Appellant's religion. Additionally, Bardakjy testified he did not know Appellant was an Orthodox Jew at the time he instructed Gracia to rescind the conditional offer of employment. Rather, Bardakjy directed Gracia to rescind the offer based on his recollection of Appellant's personality

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(Cont'd)

the employer about this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement. *See Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 516 (6th Cir. 2002); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133-34 (3d Cir. 1986); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *aff'd*, 479 U.S. 60, 107 S. Ct. 367 (1986); *Turpen v. Mo.-Kan.-Tex. R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978).

and demeanor during a previous encounter.[3] Moreover, Bardakjy testified he had no knowledge of Appellant's religion until he received notice Appellant had filed a complaint with the EEOC alleging religious discrimination. Therefore, viewing the facts in the light most favorable to Appellant, no reasonable fact-finder could conclude that Bardakjy knew of Appellant's religion, much less that Bardakjy's decision to direct Gracia to rescind Appellant's job offer was motivated by his knowledge of Appellant's religion. The district court, consequently, did not err in granting Appellee's motion for summary judgment.

IV. CONCLUSION

It is necessary for a plaintiff attempting to establish a *prima facie* case of intentional religious discrimination under Title VII to demonstrate the challenged employment decision was made by someone who had knowledge of the plaintiff's religion. Appellant failed to establish that the person responsible for deciding to rescind his job offer knew about his religion. As a result, Appellant did not establish a *prima facie* case. Accordingly, the district court did not err in granting summary judgment in favor of Appellee.

AFFIRMED.

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3. Appellant argues Bardakjy's recollection of the previous encounter is mistaken because Appellant was out of town during that time, making this a case of mistaken identity. Even if the job offer was rescinded due to a case of mistaken identity, drawing all reasonable inferences in Appellant's favor, such a fact does not establish Bardakjy knew about Appellant's religion.

APPENDIX B — ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, NORTHERN DIVISION DATED OCTOBER 14, 2001 AND FILED OCTOBER 15, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

CASE NO. 00-8213-CIV-SEITZ/GARBER

STEVEN LUBETSKY,

Plaintiff,

v.

APPLIED CARD SYS., INC.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Applied Card Systems, Inc. ["ACS"] seeks summary judgment on Plaintiff Steven Lubetsky's ["Lubetsky"] complaint that ACS rescinded an offer of employment to him because of his religious faith as an Orthodox Jew, in violation of the Civil Rights Acts of 1991 and 1964, 42 U.S.C. §§ 1981a, 2000e *et seq.* ["Title VII"]. (*See* Def.'s Mot. [D.E. No. 16].) The Court has original jurisdiction to hear this matter under 28 U.S.C. § 1331 and

28 U.S.C. § 1343(a)(3). Whereas Lubetsky has failed to establish a *prima facie* case of intentional discrimination based on religion, the Court will grant ACS' motion and enter a summary judgment dismissing this case.

BACKGROUND

On May 20, 1998, Lubetsky completed an application for employment with ACS. Several weeks later, on June 5th, Lubetsky met ACS recruiter Deborah Gracia ["Gracia"] in Boca Raton, Florida, and interviewed for the position of Correspondent Analyst.[1] After Lubetsky completed the interview and passed a short writing test, Gracia offered him this position in writing at the starting salary of $22,000, provided that his credit record proved to be satisfactory. (*See* Def.'s Mot., Ex. 1 (Steven Lubetsky Dep., Oct. 30, 2000, at 26 ["Lubetsky Dep."]).) Lubetsky then inquired about ACS' policy for accommodating the religious observances of its employees. He advised Gracia that he was Jewish and that he would need to be absent from work on several religious holidays. According to Lubetsky, Gracia replied: "Of course we have to let you off on Jewish holidays, it's illegal if we don't, but just don't go to extremes like taking off on Purim."[2] For her part, Gracia recalled only that

1. According to the record, Correspondent Analysts evaluate credit card applications received by ACS and issue "reasonably well-structured piece[s] of correspondence" explaining the firm's credit or lending decisions. (Pl.'s Opp'n, Ex. B (John Bardakjy Dep., Apr. 17, 2001, at 13 ["Bardakjy Dep."]).)

2. (*Id.* at 30.) Gracia, like Lubetsky, is Jewish. (*See* Def.'s Mot. at 2.) "[T]he Jewish festival of Purim . . . celebrate[s] the triumph

(Cont'd)

Lubetsky mentioned that "[t]he High Holidays[3] were coming up, and he asked if he could have them off." (Def.'s Mot., Ex. 2 (Deborah Gracia Dep., Sept., 2001, at 10 ["Gracia Dep."]).) Gracia testified that, at that time, she did not understand that Lubetsky was an Orthodox Jew.

Later that day, Gracia telephoned Lubetsky and informed him that ACS was rescinding its conditional offer of employment. She falsely advised him that the firm had promoted someone to fill the open position before their interview. (*See* Gracia Dep. at 117-18; Def.'s Mot. at 5; Pl's Opp'n at 4.) According to Lubetsky, Gracia said that ACS would contact him for "the next available opening." (Lubetsky Dep. at 32.) Yet two weeks later, Lubetsky discovered that ACS was still advertising a vacant Correspondent Analyst position in the South Florida Sun-Sentinel newspaper. He testified that Gracia told him that the advertisement was a mistake. (Lubetsky Dep. at 33; *see* Gracia Dep. at 18 ("I said that . . . there were still no openings").) Doubting Gracia's assertion, Lubetsky filed a

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over persecution triggered by one Jew's unwillingness to bow to a Persian king's counselor because the Jewish people worshipped only God." *New Life Baptist Church Acad. v. Town of East Longmeadow,* 666 F. Supp. 293, 313-14 (D. Mass. 1987), *rev'd on unrelated grounds,* 885 F.2d 940 (1st Cir. 1989); *see also Young v. Lane,* No. 85-20019, 1989 WL 57810, at *1 (N.D. Ill. Feb. 21, 1989) (noting that traditional interpretation of Jewish law forbids work on Purim).

3. The "High Holidays" or High Holy Days are those associated with the Jewish New Year, *i.e.,* Rosh Hashanah and Yom Kippur. *See Young v. Lane,* 1989 WL 57810, at *1 (observing that Jewish law further proscribes work on Rosh Hashanah and Yom Kippur).

charge of discrimination with the Equal Employment Opportunity Commission ["EEOC"] on February 10, 1999, alleging that ACS refused to hire him because of his religion.

During the subsequent EEOC investigation, ACS admitted that Gracia had misled Lubetsky, but only "to spare [his] feelings." (Def.'s Mot. at 5.) Gracia explained that she actually withdrew the job offer at the direction of Correspondence Department Manager John Bardakjy ["Bardakjy"], who recognized Steven Lubetsky's name as that belonging to a person who had "behaved very aggressively" at a job fair on August 2, 1997. (Def.'s Mot., Ex. 3, at 1 ["Bardakjy Decl."]; *see* Gracia Dep. at 14-16; Bardakjy Dep. at 11.) According to Bardakjy, Lubetsky acted "rudely" at the job fair when Bardakjy told him that ACS would not interview candidates at that time who did not possess three years of call center management experience. (Bardakjy Decl. at 1.)

On December 13, 1999, the EEOC issued its Dismissal and Notice of Rights, reporting that it could not conclude that ACS discriminated against Lubetsky based on his faith. (*See* D.E. No. 28, at 6.) Lubetsky then timely filed the present suit against ACS for religious discrimination.

During the course of discovery, Bardakjy reiterated that he instructed Gracia to rescind the job offer based on Lubetsky's personality and demeanor during their August, 1997, encounter: "When I met him, he was aggressive and he was insistent and he was rude, and I did not want him to disrupt the department." (Bardakjy Dep. at 17.) Lubetsky insists that this testimony is "completely false" because he

was in Pittsburgh, not Boca Raton, at that time. (Lubetsky Dep. at 37.) ACS could not produce records confirming that Lubetsky attended the August, 1997, job fair. (*See* Pl.'s Opp'n, Ex. C.) Lubetsky concedes, however, that "there may have been a case of mistaken identity." (Lubetsky Dep. at 37; *see* Def.'s Mot., Ex. 5.)

There is no evidence that Bardakjy knew of Lubetsky's religious affiliation when he directed Gracia to rescind the plaintiff's offer of employment. Bardakjy attested that Gracia never advised him that Lubetsky was Jewish, or that Lubetsky had inquired about taking time off from work to observe Jewish holidays. (*See* Bardakjy Decl. at 2.) According to Bardakjy, Lubetsky never mentioned his religious affiliation during their previous encounter. He did not recall noticing a yarmulke[4] or anything else about Lubetsky to indicate that he was a Jew. (*See id.*) At the close of discovery, ACS moved for summary judgment on Lubetsky's religious discrimination complaint.

DISCUSSION

1. Summary Judgment Standard

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party demonstrates the

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4. A "yarmulke" is a skull cap worn by some Jewish males. *See Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1360 (S.D. Fla. 1999).

absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting FED. R. CIV. P. 56(e)). Accepting this evidence as truthful, the Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether " 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251-52).

2. ACS is Entitled to Summary Judgment

Summary judgment is appropriate in this case because the undisputed record forecloses any inference that ACS rescinded its offer of employment to Lubetsky because of his religious faith. At trial, the plaintiff would bear the burden of proving that ACS intentionally discriminated against him. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Conceding that he does not have direct evidence of the firm's intent, Lubetsky relies upon the familiar *McDonnell Douglas* framework for evaluating disparate treatment claims based on circumstantial evidence. (*See* Pl.'s Opp'n at 4-5.) As explained below, however, Lubetsky cannot establish a *prima facie* case of intentional discrimination under this framework.

Appendix B

A. The *McDonnell Douglas* Framework

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court distributed the evidentiary burdens between the plaintiff and defendant in a disparate treatment complaint based on circumstantial evidence as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-53 (citing *McDonnell Douglas*, 411 U.S. at 802-04). The Court explained that a plaintiff could meet the *prima facie* burden "by showing (i) that he belongs to a racial minority [or other protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802.

Appendix B

B. Lubetsky's *Prima Facie* Burden

Of course, the foregoing elements vary in "differing factual situations." *Burdine,* 450 U.S. at 253 n. 5; *see McDonnell Douglas,* 411 U.S. at 802 n. 13. Hence, in order to establish a *prima facie* case of religious discrimination, Lubetsky must first produce evidence that:

> (1) [he] belongs to a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) he [held] a *bona fide* religious belief, and he communicated this belief to defendant; (4) he was rejected despite his qualifications; and (5) after plaintiff's rejection, the position remained open, and defendant sought applicants from persons with qualifications approximating those of complainant.[5]

As part of his *prima facie* case, Lubetsky must demonstrate that the challenged employment decision was made by someone who was aware of his religious beliefs.

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5. *Durham v. Bleckley County Sch. Sys.*, 680 F. Supp. 1555, 1558 (M.D. Ga. 1988); *see Durham v. Lithonia Lighting,* 708 F. Supp. 341, 343 (M.D. Ga. 1988) (same); *see also Beadle v. Hillsborough County Sheriff's Dep't,* 29 F.3d 589, 592 n.5 (11th Cir. 1994) ("To establish a *prima facie* case of religious discrimination under Title VII, the plaintiff must present evidence sufficient to prove that (1) he had a *bona fide* religious belief that conflicted with an employment requirement; (2) he informed his employer of his belief; and (3) he was discharged for failing to comply with the conflicting employment requirement.") (citing *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144 (5th Cir. 1982)).

Appendix B

As the Court of Appeals for the Ninth Circuit observed in *Robinson v. Adams,* 847 F.2d 1315 (9th Cir. 1987), no inference of discrimination arises from an adverse employment action unless the person who instigated that action [the "decision-maker"] knew that the plaintiff belonged to a class (*i .e.,* race, color, religion, sex, or national origin) protected by Title VII.

> Under Title VII . . . a plaintiff must prove intentional discrimination to make out a discrimination claim using a disparate treatment theory. An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race. . . .
>
> . . . The *McDonnell Douglas* test defines one method of proving a *prima facie* case of discrimination-proof from which a trier of fact can reasonably infer intentional discrimination. But the *McDonnell Douglas* elements would not rationally create this inference if, as here, a plaintiff offers proof that he is Black, but there is no showing by direct or indirect evidence that the decision-maker knew this fact.

Id. at 1316. In *Robinson,* the Ninth Circuit affirmed a summary judgment and held that the plaintiff failed to establish a *prima facie* case of discrimination, notwithstanding the fact that the plaintiff disclosed his race to the defendants on an employment application form, because there was no evidence that the decision-maker or decision-makers knew that he was an African-American. The application form stated that the information was being collected for statistical purposes only and would not be furnished to the decision-maker(s). *Id.*

Appendix B

Numerous federal courts across the country have echoed *Robinson* in concluding that, in order to establish a *prima facie* case of discrimination, an aggrieved applicant must show that the decision-maker was aware that he or she belonged to a protected class.[6] Lubetsky has failed to identify such evidence.

C. Lubetsky Has Failed to Establish a *Prima Facie* Case of Religious Discrimination

ACS contends that it is entitled to summary judgment because Lubetsky cannot establish a key element of his *prima facie* case — there is no evidence that the challenged employment decision was made by a person who was aware of the plaintiff's religious convictions. (*See* Def.'s Mot. at 8-10.) The Court concurs with ACS. Bardakjy testified that he instructed Gracia to rescind the job offer based on Lubetsky's personality and demeanor during their August, 1997, encounter, not his religious faith: "When I met him, he was aggressive and he was insistent and he was rude, and I did not want him to disrupt the department." (Bardakjy Dep. at 17.) The evidence is uncontroverted that Bardakjy did not know that Lubetsky was Jewish when he directed Gracia to rescind the conditional offer

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6. *See, e.g., Gomez v. Medical Coll.*, Civ. No. 92-5048, 1994 WL 423847, at *11 n.7 (E.D. Pa. Aug. 12, 1994) (entering summary judgment on plaintiff's national origin discrimination complaint and noting that "the defendant must be subjectively aware of this characteristic in order to intentionally discriminate against him"); *Johnson v. Northwest Airlines*, 839 F. Supp. 1253, 1259 (E.D. Mich. 1993) (following *Robinson* and dismissing racial discrimination complaint); *see also Visarraga v. Garrett*, Civ. No. 88-2828, 1993 WL 209997, at *6 (N.D. Cal. 1992) (applying *Robinson* to plaintiff's claim as member of "impaired" protected class under Rehabilitation Act, 29 U.S.C. § 791).

of employment. *See supra* pages 3-4; (Def.'s Mot. at 9). Consequently, no reasonable fact-finder could infer from the record that Bardakjy ordered Gracia to rescind the job offer because of Lubetsky's religious affiliation. *See Robinson,* 847 F.2d at 1316; *Gomez,* 1994 WL 423847, at *11 n. 7; *Johnson,* 839 F.Supp. at 1259.

Lubetsky has failed to identify a material issue for trial concerning Bardakjy's knowledge of his religious affiliation. His testimony sharply conflicts with Bardakjy's sworn recollection with respect to another, completely different issue — whether they met each other at a job fair on August 2, 1997. (*See* Lubetsky Dep. at 37; Bardakjy Dep. at 17.) The plaintiff strenuously argues that Bardakjy's recollection of his behavior is false because ACS could not produce records confirming that he attended the job fair, he was in Pittsburgh at the time, and Gracia misled him when she withdrew his job offer. (*See* Pl.'s Opp'n at 1, 4-6.) This line of argument is unnecessary. At this stage of the proceedings, the Court must accept Lubetsky's testimony as true and draw reasonable inferences in his favor. *See Allen,* 121 F.3d at 646. Accepting Lubetsky's testimony, a fact-finder could reasonably infer that Bardakjy mistakenly confused the plaintiff's name with that belonging to another applicant, and then ordered Gracia to rescind the job offer. (*See* Def.'s Mot. at 12.) Indeed, the plaintiff readily acknowledged that "there may have been a case of mistaken identity." (Lubetsky Dep. at 37; *see* Def.'s Mot., Ex. 5.) However, this inference of mistaken identity casts no light on whether Bardakjy knew that Lubetsky was Jewish. Nor does it preclude summary judgment.

Appendix B

CONCLUSION

As a matter of law, Lubetsky cannot establish a key element of his *prima facie* case of religious discrimination because there is no evidence that the decision-maker knew of his religious affiliation when he directed a subordinate employee to withdraw an offer of employment. Following the weight of authority, the Court must enter summary judgment for the defendant and dismiss this case. It is hereby

ORDERED that Defendant Applied Card Systems, Inc.'s Motion for Summary Judgment [**D.E. No. 16**] is GRANTED. The Court will enter a separate Final Summary Judgment dismissing this case.

DONE AND ORDERED in Miami, Florida, this 14th day of October, 2001.

s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 3, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-17203-JJ

STEVEN LUBETSKY,

Plaintiff-Appellant,

versus

APPLIED CARD SYSTEMS, INC., a corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: EDMONSON, Chief Judge, BLACK and COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

s/ Susan Black
UNITED STATES CIRCUIT JUDGE